In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1308

ROBERT I. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 326 F. Supp. 459. The opinion of the three-judge panel of the court of appeals (Pet. App. A 17-34) is reported at 477 F. 2d 757. The *per curiam* opinion of the court of appeals sitting *en banc* (Pet. App. B 35-52) is reported at 487 F. 2d 1335.

JURISDICTION

The judgment of the three-judge panel was entered April 17, 1973, and the judgment of the court of appeals sitting *en banc* was entered November 28, 1973. The petition for a writ of certiorari was filed on February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an attorney is entitled to invoke his client's Fifth Amendment privilege against self-incrimination as a ground for refusal to comply with an internal revenue summons served upon him requiring the production of records belonging to the client's accountant which related to the preparation of the client's prior tax returns and which the accountant delivered to the attorney at the attorney's request after the commencement of a tax investigation of the client.

2. Whether the return of an indictment for income tax evasion more than two years after the issuance of an internal revenue summons precludes judicial enforcement of the summons.

STATUTE INVOLVED

Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) is set forth at Pet. App. C 53.

STATEMENT

From 1962 through 1968, the tax returns of Louis D. and Carolyn R. Roberts were prepared by Stanley H. Voelkel, an independent certified public accountant. In 1967, Voelkel had prepared workpapers in connection with an offer in compromise submitted to the Internal Revenue Service with respect to Roberts' tax libabilities for prior years. A special agent was subsequently assigned to investigate the settlement offer. This investigation was expanded to include the correctness of Roberts' returns for the years 1966 through 1969 (Pet. App. A19-20).

When Roberts learned that a special agent was involved in the investigation, he turned to petitioner, an attorney, for counsel. Petitioner thereafter obtained from Voekel the accountant's workpapers prepared in connection with

the offer in compromise and the tax returns for the years 1962 through 1968. Subsequently, in the course of the expanded investigation, the special agent issued a summons to petitioner for the production of the accountant's workpapers pertaining to the returns filed for the years 1966 through 1969. Petitioner refused to comply with the summons and judicial enforcement was sought in the United States District Court for the Southern District of Texas (Pet. App. A 20-21).[1]

After a hearing, the district court ordered enforcement of the summons (Pet. App. A 18). The court of appeals affirmed, with one judge dissenting (Pet. App. A 17-34). On rehearing *en banc*, the court of appeals reaffirmed the opinion of the panel, again with one judge dissenting (Pet. App. B 35-52). While the case was pending in the court of appeals, the Internal Revenue Service recommended to the Department of Justice that Mr. Roberts be prosecuted for criminal tax evasion. Shortly after the opinion of the three-judge panel was filed, Roberts was indicted on 11 counts of alleged income tax felonies (Pet. 3).

ARGUMENT

1. The decision below upholds the enforcement of an internal revenue summons requiring the production by an attorney of an accountant's workpapers given to the attorney by the accountant. The papers relate to the accountant's preparation of past tax returns of a client and were given to the attorney at his request after he was retained by the client upon the commencement of a

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[1]The district court denied taxpayers' request to intervene in the enforcement proceeding. They did not appeal from this ruling (Pet. App. A 18-19, n. 2).

tax investigation of the client. In these circumstances, the court of appeals correctly concluded that the client's Fifth Amendment privilege against self-incrimination could not be invoked by the attorney as a bar to the production of the summoned workpapers.

Petitioner first urges (Pet. 4-7) that the decision below conflicts with *Couch* v. *United States*, 409 U.S. 322. The Court there held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the compelled production of the records by the accountant. Since the claimant of the privilege in *Couch* did not have possession of the records in question, the Court concluded that "the ingredient of personal compulsion against an accused [was] lacking" (409 U.S. at 329). As the Ninth Circuit stated in *United States* v. *Cohen*, 388 F. 2d 464, 468, quoted with approval by this Court in *Couch* v. *United States*, *supra*, 409 U.S. at 330, n 12, " 'it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.'"

Here, the claimant of the privilege, petitioner's client,[2] is even further removed from the papers at issue

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[2]Because the court of appeals found the privilege against self-incrimination inapplicable, it found it unnecessary to decide the question whether an attorney can raise a Fifth Amendment claim on behalf of his client (Pet. App. A 23-24). Compare *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8), with *United States* v. *Judson*, 322 F. 2d 460 (C.A. 9). Thus, contrary to petitioner's argument (Pet. 7), there is no conflict with the *Judson* decision, which holds that an attorney can raise the privilege of his client with respect to the client's own records which were delivered directly by the client to his attorney. We note, however, that *Judson* was decided prior to this Court's reaffirmation in *Couch*, *supra*, 409 U.S. at 328, that "the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that might incriminate him" (emphasis in original). See, also, *Bellis* v. *United States*, No. 73-190, decided May 28, 1974, slip op. p. 5.

than was the claimant in *Couch*. The summoned workpapers in this case belong to the accountant and not to the taxpayer. If the taxpayer's own books and records are not protected when they are in the hands of an accountant, surely compelled production of the workpapers here, which belonged to the accountant and were never in the possession of the taxpayer-claimant, does not constitute "extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States, supra,* 409 U.S. at 328. The decision below, therefore, not only does not conflict with *Couch* but follows *a fortiori* from it.

Recognizing that the taxpayer on behalf of whom the privilege is claimed in this case does not have actual possession of the papers in question, petitioner contends (Pet. 5-8) that the claimant is in constructive possession of the summoned material. Petitioner relies on the Court's statement in *Couch, supra,* 409 U.S. at 333, that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." See also *id.* at 337 (Brennan, J., concurring). However, there is no basis for deeming the taxpayer-claimant here to be in constructive possession of the documents.[3] Not only was there "no mere fleeting divestment of possession" (*Couch, supra,* 409 U.S. at 333), but there was never any actual possession by the

[3]Petitioner does not contend that the taxpayer turned over the workpapers to him for custodial safekeeping. Cf. *United States* v. *Guterma,* 272 F. 2d 344 (C.A. 2); *Schwimmer* v. *United States,* 232 F. 2d 855 (C.A. 8). Nor would there be any basis for such a claim since petitioner is not holding the papers in a custodial capacity and obtained them from the accountant rather than the taxpayer.

taxpayer of the accountant's workpapers. To the contrary, they were prepared by the accountant and remained in his possession until he transferred them to petitioner. Surely the taxpayer-claimant is not in constructive possession of workpapers over which he never exercised any dominion or control.[4]

2. Contrary to petitioner's further argument (Pet. 7) the decision below does not conflict with *United States* v. *Cohen*, 388 F. 2d 464 (C.A. 9).[5] Unlike the taxpayer here, the taxpayer in *Cohen* had possession of the records at the time the summons was served. While the workpapers in *Cohen* and in the present case both originated with an accountant, the Ninth Circuit there concluded that the claimant's possession "[could] not fairly be characterized as wrongful" (388 F. 2d at 470). The court based this conclusion upon the uncontradicted testimony of the accountant that he considered all papers relating to

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[4]Petitioner does not contend that the attorney-client privilege applies to the workpapers. Cf. *Couch* v. *United States, supra*, 409 U.S. at 350-351 (Marshall, J., dissenting). Indeed, there is no basis for such a claim because that privilege applies only to confidential communications between attorney and client. It does not encompass communications between the attorney and third persons unless the third person is merely acting as an agent in transmitting the communication from the client to the attorney. See VIII Wigmore, *Evidence* (McNaughton rev.), Sec. 2317; *United States* v. *Goldfarb*, 328 F. 2d 280 (C.A. 6); *United States* v. *Threlkeld*, 241 F. Supp. 324 (W.D. Tenn.). And the taxpayer's disclosures to the accountant were, of course, not privileged. *Couch, supra*, 409 U.S. at 335.

[5]Petitioner also suggests (Pet. 8) that the decision below conflicts with *United States* v. *Egenberg*, 443 F. 2d 512 (C.A. 3). But all *Egenberg* held was that an accountant could not refuse to produce a client's records in his possession which bore on the accountant's tax liability. The court concluded that such third-party records were not held by the accountant "in a purely personal capacity." See *United States* v. *White*, 322 U.S. 694, 699; *Bellis* v. *United States, supra*.

his clients' affairs to be theirs to command and that it was his unvarying practice to deliver such papers to the client when requested. Here, however, the accountant's workpapers neither belonged to nor were in the possession of the taxpayer-client.[6]

3. Finally, petitioner urges (Pet. 8, 13-14) that judicial enforcement of the summons, issued prior to a recommendation by the Internal Revenue Service to the Department of Justice for prosecution, was improper because the taxpayer was indicted approximately two and one-half years later. But the "rights and obligations of the parties became fixed when the summons was served" (*Couch, supra,* 409 U.S. at 329, n. 9), and petitioner's contention is thus foreclosed by this Court's holding in *Donaldson* v. *United States,* 400 U.S. 517, 536, that an internal revenue summons may be issued in aid of an investigation if it is issued, as in this case, in good faith and prior to recommendation for criminal prosecution.[7] Where the

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[6]The reference to *Cohen* by this Court in *Couch, supra,* 409 U.S. at 330, n. 12, noted that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." But the Court further noted (*ibid.*) that it was not deciding "what qualifies as rightful possession enabling the possessor to assert the privilege." On the latter issue the Ninth Circuit's view has been criticized by other courts of appeals. See *United States* v. *Widelski,* 452 F. 2d 1, 5 (C.A. 6), certiorari denied, 406 U.S. 918, and cases cited therein.

[7]Contrary to petitioner's suggestion (Pet. 14), *United States* v. *Billingsley,* 469 F. 2d 1208 (C.A. 10), merely followed this principle in upholding the enforcement of a summons prior to a recommendation by the Internal Revenue Service to the Department of Justice that the case be considered for criminal prosecution.

possibility of civil liability as well as criminal prosecution existed at the time of issuance, the summons is enforceable. *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2), certiorari denied, 373 U.S. 902; *United States* v. *Weingarden*, 473 F. 2d 454 (C.A. 6); *United States* v. *Cromer*, 483 F. 2d 99 (C.A. 9); *Sanford* v. *United States*, 358 F. 2d 685 (C.A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

JOHN P. BURKE,
CARLETON D. POWELL,
Attorneys.

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